52214

10 21.A-87

PEOPLE OF THE STATE OF ILLINOIS ex rel. FOOD EMPIRE, INC., an Illinois Corporation,	)	
Petitioner-Appellee,	)	Appeal from the Circuit Court of Cook County,
v.	)	County Department,
	)	Law Division.
CITY OF CHICAGO, a municipal corporation, JOHN C. MARCIN, City Clerk, and O. W. WILSON, Superintendent of Police, and WILLIAM T. PRENDERGAST, City Collector,	)	Charles S. Dougherty, J.
Respondents-Appellants.	)	

MR. PRESIDING JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The petitioner, Food Empire, Inc., applied to the City Collector of Chicago for wholesale and retail food purveyor's licenses in order to operate a supermart at 3660 S. Indiana Avenue. The applications were denied. It then filed a petition for a writ of mandamus to compel the respondents to issue the licenses. A hearing was held after which the court ruled in favor of the petitioner and ordered the issuance of the writ.

The City of Chicago and the other respondents appeal from the order but we need not consider their contentions because the petitioner has not submitted a brief. When an appeal is perfected and the appellee does not submit an answering brief, the reviewing court may reverse the judgment without further explanation of the merits of the appeal. Woodward v. Woodward, 96 Ill.App.2d

251, 238 N.E.2d 269 (1968); Matyskiel v. Bernat, 85 Ill.App.2d 175, 228 N.E.2d 746 (1967); 541 Briar Place v. Harman, 46 Ill. App.2d 1, 196 N.E.2d 498 (1964).

The judgment is reversed.

Reversed.

Schwartz and Sullivan, JJ., concur.

51244

102 I.A.2/151

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JAMES E. WOMACK, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Eugene L. Wachowski, Presiding.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

In a jury trial, the defendant, James E. Womack, was convicted of armed robbery and judgment was entered. After motions for a new trial and in arrest of judgment were denied, he was sentenced to not less than two nor more than six years in the Illinois State Penitentiary. The defendant appeals contending that he was not proven guilty beyond a reasonable doubt, and alternatively, that he did not receive a fair trial because of: (1) the trial court's refusal to grant him a continuance before the voir dire examination of prospective jurors in this case, thereby allegedly denying the defendant a trial before an impartial jury; and (2) the alleged prejudicial closing argument of the prosecutor.

This case involves an armed robbery which occurred in the Stereo Lounge in Chicago, Illinois. Two eyewitnesses to the crime, Bernard Pergricht and Quinnion Peoples, testified for the State. Pergricht stated that at approximately 1:45 A.M. on August 1, 1965, he was on duty as a bartender in the Stereo Lounge. At that time the defendant and two other men entered the lounge together. The defendant asked Pergricht for a bottle of wine. As Pergricht was placing the wine on the counter, he noticed that one of the other men, who had entered the lounge with the defendant, moved somewhat and that a shotgun, which had been previously concealed, fell to the floor. The man who had been secretly holding the shotgun immediately retrieved it and pointed it at Pergricht

as the third man emptied the cash register, took money and a wristwatch from Pergricht, and placed on the service counter a bottle of whiskey and a small transistor radio, both of which were the property of the Stereo Lounge. Pergricht testified that the defendant, meanwhile, had leaned over the service counter to the left of the shotgun in an apparent attempt to conceal it from on-the-street viewing. In time, all three men fled from the lounge. Pergricht stated that the defendant took the whiskey, the wine, and the transistor radio from the counter and both he and the man holding the shotgun backed out of the lounge to the front entrance of the tavern whereupon they fled.

Approximately five weeks after the armed robbery, Pergricht identified the defendant from a five-man showup as being one of the three men who had committed the crime. Pergricht testified that the defendant admitted, after being identified by him, that he knew Pergricht from prior meetings in the Stereo Lounge, but he refused to disclose to the police the identity of the two men who were with him that night. In conclusion, Pergricht testified that the defendant never paid or offered to pay for the wine that he had ordered prior to the commission of this crime.

On cross-examination, Pergricht testified that the offense occurred in the early morning hours of Sunday, August 1, 1965. Three men, including the defendant, entered the lounge together and as the man holding the shotgun left with the defendant after the property had been taken, he said to the defendant, "Let's get out." The defendant said nothing while the crime was in progress. At no time did Pergricht see the defendant's arm in a sling or a cast. Both of his arms were leaning visibly on the counter when he attempted to conceal the shotgun from on-the-street viewing.

Quinnion Peoples also testified for the State and stated that he knew the defendant from the time both men worked for the

same employer, in the same department. On August 1, 1965, at approximately 1:45 A.M. he saw the defendant, who was alone, pull up in a car in an alley near the Stereo Lounge, get out, and cross in front of Peoples, who was standing at the front door of the Stereo Lounge. Peoples asked the defendant what he was doing in this neighborhood. "He mumbled something" and Peoples walked away. Later, when returning to the front entrance of the Stereo Lounge, Peoples saw three men inside. One of them was holding a shotgun and the defendant was standing next to him. In time, all three men ran out of the lounge and all of them left in the car which Peoples had seen the defendant drive up in earlier. On cross-examination, Peoples testified that he did not see the defendant with anyone when he spoke with him briefly before the offense occurred, and the defendant's wrist or arm was not in a sling at the time.

Two detectives, Allen and Soil, also testified for the State. Allen stated that he got the defendant's name from Peoples and later, with Detective Soil, arrested the defendant. It was Allen's testimony that the accused initially stated that at 1:45 A.M. on August 1, 1965, he was working, but when this attempted alibi was investigated and disproved by the police, the defendant then stated that he was at a birthday party for his mother, but he refused to tell the police where this party was held or who was present. Continuing, Detective Allen stated that the defendant denied being in the Stereo Lounge on August 1, 1965, and denied committing any offense. However, the defendant later admitted, in the presence of both detectives, that he was present in the lounge at the time of the robbery and he knew the identity of the other two men in the tavern, but he could not divulge their names because they were close friends of the family.

Detective Soil corroborated much of Detective Allen's

testimony. On cross-examination, he testified that the defendant had told him that he had injured his hand and at the time of his arrest, Detective Soil noticed that there was a scar on the defendant's hand. On redirect examination, Detective Soil stated that when the defendant showed him this scar, the accused did not mention when he had sustained the injury but he did mention that his hand was in a cast in August, 1965, when the armed robbery occurred.

Four witnesses, including the accused, testified for the defense. Alfonso Avery, a close friend of the defendant, testified that he was with the accused in front of the Stereo Lounge at 1:45 A.M. on August 1, 1965, and he did not see the defendant talk with anyone. Avery did see the defendant enter the Stereo Lounge and he noticed that three men crossed the street at this time also. Two of these men went into the lounge behind the accused. About thirty seconds later, the defendant came running out holding a bottle of wine and stated that the tavern was being robbed. This witness and the defendant then left hurriedly. Avery stated that the defendant's arm was in a sling on August 1, 1965, but it was removed soon thereafter. On direct examination, this witness admitted to being drunk on August 1, 1965, and on cross-examination, he stated that he was with the defendant by the Stereo Lounge late Sunday night and early Monday morning and not late Saturday night. [The crime, in fact, occurred early Sunday morning].

Estelle Carr, the accused's aunt and foster mother, testified for the defense and stated that the defendant had been operated on in June, 1965, causing him to wear a cast on his arm until July and a metal splint thereafter until it was removed sometime in August. On cross-examination, this witness stated that when the metal splint was on, the defendant also had his arm in a sling until August, 1965.

Johnny Womack, the defendant's older brother, also testified for the defense. He stated that after the preliminary hearing on this charge, Detectives Allen and Soil told him that his brother had nothing to do with the armed robbery, but he knew the other fellows who did it. They suggested that the witness talk to his brother and persuade him to give the police their names. He did speak with his brother but to no avail. In rebuttal, Detective Allen denied that he ever told Johnny Womack that his brother, the defendant, had nothing to do with the armed robbery.

The accused, James E. Womack, testified in his own behalf and initially stated that he had been convicted of armed robbery in 1960 and had served his sentence. On August 1, 1965, he was wearing a cast on his left hand and was with Alfonso Avery by the Stereo Lounge when he alone, the defendant, entered the lounge, ordered a bottle of wine, and noticed that two men had entered the tavern after he had and were standing behind him. It was the defendant's testimony that one of these two men dropped a shotgun but immediately retrieved it, told the bartender to lie on the floor, and gave the defendant a glare causing the accused to take his wine and back out of the lounge's front door. He paid for the wine by leaving money on the counter. The defendant then denied any participation in this crime, denied taking whiskey and a transistor radio from the premises, and denied knowing the two men who allegedly did rob the lounge. On cross-examination, the defendant denied meeting Quinnion Peoples in front of the Stereo Lounge on August 1, 1965, and denied getting out of any car near the tavern on that date.

The defendant initially contends that he was not proven guilty beyond a reasonable doubt. However, two eyewitnesses to the crime testified for the State and indicated, if believed by

the jury, that the defendant was a participant in the armed robbery and not just an innocent bystander. The defendant took the witness stand, denied his guilt, and presented other witnesses to this end. Nevertheless, the jury as the trier of fact in this case had the duty to evaluate the testimony presented by both sides and to weigh the credibility of all the witnesses. By its verdict of guilty, it chose to believe the witnesses presented by the State. It was the finding of the jury that the defendant had been proved guilty beyond a reasonable doubt. After reviewing the record in this case, it is our opinion that the jury did not err. This is not a case in which a reviewing court is duty-bound to reverse the verdict of the jury.

The defendant also contends that the trial court erred in not granting his motion for a continuance presented before the voir dire examination of the prospective jurors in this case. In his oral motion defense counsel urged that it was impossible to select an impartial jury for his client because of the remarks of another judge, made eight days earlier, to a jury in an unrelated criminal case. In his remarks the trial court had rebuked that jury for returning a not guilty verdict and these remarks allegedly were given widespread newspaper publicity and allegedly were the topic of much conversation among the array of jurors serving at the time in the Criminal Courts Building of Cook County. As a result, the defendant moved that his trial be continued for one week thereby enabling an entire new array of jurors to be serving when his case again came up on the trial call. His motion was denied and the jury returned a guilty verdict. The transcript of proceedings shows that after denial of this motion for a continuance, the trial court said to the attorneys for both sides, before any voir dire examination of prospective jurors began:

> ". . . If counsel for the defendant wishes, he may inquire of the jurors first whether or not

> they heard anything concerning these remarks. And if they have, then he may further inquire as to whether or not these remarks would in any way influence their judgment in the arriving of a verdict. And in view of that leeway that you will be granted in questioning the jurors, I think that we will be able to get twelve fair and impartial jurors to try this cause. . . ."

The voir dire examination of prospective jurors is not included in the transcript of proceedings. The alleged prejudicial newspaper articles also are not included in the record. Therefore, this court cannot determine on the basis of any facts in the record if the defendant's right to an impartial jury was not protected by the use of his challenges for cause and preemptory challenges on voir dire or if the newspaper articles were, in and of themselves, prejudicial to the defendant. The argument of the defendant would have this court rule that the remarks of another judge to another jury in an unrelated criminal case, which remarks were made eight days prior to the voir dire examination of prospective jurors in the instant case, in and of themselves were prejudicial to the defendant and could not be cured by the remedial actions of the trial court in the instant case, nor by the effective use of challenges for cause and preemptory challenges by defense counsel. We are not persuaded to so hold in this case when the voir dire examination of prospective jurors is not included in the transcript of proceedings nor are the alleged prejudicial newspaper articles included in the record. For us to so hold would be to elevate speculation to the status of proven fact.

Thirdly, the defendant urges that he was deprived of a fair trial due to the alleged prejudicial closing argument of the prosecutor. Specifically, the defendant complains of the following remarks:

> Prosecutor: ". . . You (the jury) listened to Mr. Peoples. The only unfortunate thing was that Counsel, who has gone to college, played games with a man who was educated in the State of Louisiana.

Defense Counsel: Judge, I'll object to that. I wasn't playing games.

Court: Well, the jury heard what transpired."

This remark by the prosecutor should not have been made, as it tends to place defense counsel on trial along with his client. Although improper, the remark is not prejudicial within the facts and circumstances of this case, which convincingly establish the criminal guilt of the defendant beyond a reasonable doubt. We cannot say, in light of this record, that the above remark influenced the jury in the return of its guilty verdict.

The defendant finally urges that two other remarks by the prosecutor in closing argument were also prejudicial. However, this point was waived when defense counsel failed to object to them at the trial. See People v. Conrad, 81 Ill. App. 2d 34, 225 N.E. 2d 713 (1967).

For the foregoing reasons, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and MC NAMARA, J., concur.

52604

102 I.A.2/55

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. GEORGE WILLIAMS, Defendant-Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY. HON. ALEXANDER J. NAPOLI, Presiding Judge.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

An indictment charged defendant with burglary of $1,200.00 from the Catholic Bishop of Chicago, a corporation sole. A jury found him guilty and he was sentenced to serve a term of 15 to 25 years in the penitentiary. On appeal judgment was reversed and the cause remanded for a new trial. See People vs. Williams, 72 Ill. App. 2d 96. On August 12, 1966 the cause was reinstated on the trial court docket. The case was continued from time to time until July 26, 1967, when an order was entered on motion of the People that the cause be stricken with leave to reinstate. The order was entered over the objection of defendant. He appeals. The Assistant State's Attorney informed the court, as ground for his motion, that Reverend Richard Todd, the sole eyewitness, had been assigned to missions in the Republic of Guatamala and was not expected to return to Illinois until three years had elapsed.

The defendant was represented by the Public Defender of Cook County, who urged the court to make a finding of not guilty because the defendant was denied his constitutional right to a speedy trial, citing Klopfer vs. North Carolina, 386 U.S. 213. On May 15, 1968 the Public Defender filed herein a motion to withdraw as counsel, supported by a brief. The Public Defender relies upon People vs. Baskin, 38 Ill. 2d 141, which distinguishes the Klopfer case. In Baskin our Supreme Court does not read the opinion of the U. S. Supreme Court as a blanket condemnation of all state court procedures permitting the striking of an indictment with leave to reinstate. The Baskin opinion points out that the constitution protects only against arbitrary

and oppressive delays and holds that so long as a defendant is tried within 120 days of demand for trial he has not been deprived of his right to a speedy trial. In Baskin the court said that the taking of the appeal suspended the operation of the statute; that from the time the notice of appeal was filed the trial court lost jurisdiction to proceed and the complaint could not be reinstated while the appeal was pending. In affirming the judgment our Supreme Court said that the State "will therefore have 120 days after the mandate of this court is filed in the trial court within which to reinstate the cause." Under the Baskin opinion the instant appeal tolled the 120 days statute.

On May 28, 1968, the defendant who is serving a term in the Illinois penitentiary on conviction under a separate indictment was informed of the motion of the Public Defender to withdraw as his attorney and given a copy of the brief filed in support of the motion; he was given until August 1, 1968 to file any points he might choose in support of his appeal and told that if the court finds that the appeal is wholly without merit "it may grant counsel's request to withdraw and affirm the judgment without further appointment of counsel." The defendant has not filed any points or suggestions in support of his appeal.

We agree with the Public Defender that the appeal is wholly frivolous. There is a question as to whether the order is appealable. The Public Defender is therefore given leave to withdraw and the appeal is dismissed.

APPEAL DISMISSED.

McNAMARA, J., and LYONS, J., concur.

53036

102 I.A.2 165-1

JOAN KAUTZ, Plaintiff-Appellee, vs. EDMUND PAUL KAUTZ, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY. HON. ALFONSE WELLS, Presiding Judge.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

The parties hereto were married at Chicago on August 27, 1960 and cohabited as husband and wife until November 7, 1966. One child, a boy, was born to the parties on October 14, 1965. On November 13, 1967 the wife filed a second amended complaint for divorce and other relief. She charged her husband with extreme and repeated mental and physical cruelty toward her. In an answer he denied the charges.

On December 15, 1967 the court entered a decree finding the defendant guilty of extreme and repeated mental and physical cruelty toward the plaintiff and severed the bonds of matrimony between the parties. The decree awarded the permanent care, custody, maintenance and education of their then two year old son to the mother with the right of visitation by the father. The decree required the defendant to pay plaintiff $25.00 per week for child support and $35.00 per week as alimony, with the right in the plaintiff to earn $25.00 net per week in addition thereto, all of which was based upon defendant's gross earnings of $311.50 every two weeks. Defendant also was required to pay all Blue Cross-Blue Shield premiums for the plaintiff and the child.

The decree adjudged that plaintiff have the sole and exclusive ownership of all the furniture of the parties; that defendant pay $400 to plaintiff's attorney as fees; and that plaintiff relinquish all interest in an automobile used by the parties.

On December 28, 1967 the defendant filed a petition to modify the decree. In the petition he sets out that he is a police officer

employed by the City of Chicago with a take-home salary of $106 per week; that plaintiff is a registered nurse of ten years experience who, when the parties lived together, earned as much as $22.00 per day; that she and their child reside with her parents; that the $60 per week ordered to be paid in the decree amounts to 56 percent of defendant's net earnings; that he is in debt in the amount of $5,000; that he is also required to pay $400 additional attorney's fees for plaintiff; and that the amount of alimony required to be paid is excessive and unreasonable. Defendant asked the court to grant him a rehearing to modify the decree to require payments by him commensurate with his income, ability and station in life and the needs of plaintiff and their child. The court denied the prayer of the petition on the ground that the defendant "failed to show any change of circumstances to warrant a modification" of the decree. The defendant appeals. Plaintiff has not filed an appearance or brief.

It will be noted that the petition was filed within thirty days of the entry of the decree. The petition sought a rehearing for the purpose of modifying the decree by reducing the payments. The court denied the petition on the ground that the defendant failed to show any change of circumstances to warrant a modification of the decree. The plaintiff did not file an answer to the petition. The defendant asserts that his net income at the time of the entry of the decree was $106 per week and that the decree in requiring him to pay 56 percent of his salary is excessive and punitive.

We are of the opinion that there should be a hearing to determine a reasonable award for the support and maintenance of the plaintiff and the child, based upon the needs of the wife and child and the present ability of the defendant to pay. Therefore the order

denying the petition for a rehearing of the monetary provisions of the decree is reversed and the cause is remanded with directions that the plaintiff answer the petition and for further proceedings consistent with these views.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

McNAMARA, J., and LYONS, J., concur.

NO. 68-9

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiffs-Appellees, vs. LENDELL D. GERSBACHER, Defendant-Appellant.	)	Appeal from the Circuit Court of Jefferson County. Honorable Henry Lewis, Trial Judge.

Goldenhersh, J.

Defendant, Lendell D. Gersbacher, was tried by jury in the Circuit Court of Jefferson County and convicted of the offenses of Attempt (sec. 8-4), Rape (sec. 11-1) and Aggravated Battery (sec. 12-4), (Ch. 38, Ill. Rev. Stat. 1965). The court denied motions for a new trial and in arrest of judgment, heard testimony in aggravation and mitigation, denied probation, and on the convictions for Rape and Attempt, sentenced defendant to the Illinois State Penitentiary for not less than 7 nor more than 14 years, the sentences to run concurrently. The court imposed no sentence on the conviction for Aggravated Battery, and continued further action thereon to a later date.

Defendant contends that the indictments do not charge an offense, and the trial court erred in its denial of defendant's motions to dismiss, and in arrest of judgment.

With respect to the count of the indictment charging Attempt, defendant argues that it does not set forth the nature and elements of the offense charged, fails to meet the requirements of section 111-3 of the Code of Criminal Procedure, (Ch. 38, secs. 100 et seq., Ill. Rev. Stat.) and the court erred in permitting The People to amend

this count by inserting defendant's name therein.

This count alleges an attempt to kill and murder the named victim within Jefferson County on December 5, 1966 by unlawfully, intentionally and with malice aforethought, shooting her three times with a gun or pistol. In one place in the form of indictment used, defendant's name was omitted, and upon leave given, The People amended it by inserting his name.

The purpose of an indictment is to apprise a defendant of the exact crime with which he is charged, so that he may prepare his defense, and plead the judgment of conviction or acquittal in bar of a second prosecution for the same offense. If it meets this test, it may be amended to supply formal deficiencies (Ch. 38, sec. 111-5, Ill. Rev. Stat.).

This count of the indictment meets the requirements of section 111-3 of the Code of Criminal Procedure, and the insertion of defendant's name in the place where it was omitted was, under the circumstances, a formal matter which in no manner prejudiced the defendant.

The count charging Aggravated Battery alleges all of the elements enumerated in the statute, and meets the requirements of 111-3.

The count charging Rape omitted the word "female" before the phrase "not his wife", and The People were given leave to insert the missing word. The indictment is otherwise sufficient, and the court did not err in permitting the amendment.

Defendant contends that the evidence fails to prove him guilty of the offenses, or any of them, beyond a reasonable doubt.

The prosecutrix testified that at approximately midnight on December 4, 1966, a man, whom she identified as defendant, came to the laundromat where she was washing clothes, asked if a car in the

parking lot was hers, told her a tire was flat and if she had a jack, he would change it for her; she told him the keys were in the ignition, he left, came back, and told her they were not; she came out to the parking lot to find the keys, and at gun point he forced her to enter an automobile, drove her to a house in Mt. Vernon, raped her, drove her to another place on the outskirts of town, where he shot her and left her lying in a ditch. She was found at about 2:00 A.M., and shortly thereafter the Mt. Vernon police put out a radio call for the apprehension of a man of defendant's general description, allegedly driving a car similar in type and color to that owned by defendant. Prior to the occurrence, the witness did not know defendant.

There is testimony that defendant owned a .32 caliber pistol, an opinion expressed that the bullets removed from the prosecutrix were of that caliber, conflicting testimony as to whether, several hours after she was found, the Chief of Police at Mt. Vernon smelled defendant's pistol and stated it had not been fired.

Defendant's parents testified that he left their home at approximately 6:45 P.M. on December 4, and they next heard from him by telephone at 2:00 A.M. on December 5, 1955. In response to the phone call, his father went to defendant's home and found him slumped in a chair, bleeding from the wrist. His mother arrived shortly thereafter, and a doctor was called. Before the doctor arrived, defendant left the house and drove away in his automobile. A state trooper stopped him for a reason unrelated to the alleged offense, and later reported the incident to the Mt. Vernon police, furnished them with defendant's license number, and he was arrested.

The manager of a drive-in theater at Mt. Vernon testified

defendant was in the theater at 10:30 P.M. on December 4th.

The chief of the Mt. Vernon police department testified that when he talked to defendant on the morning of December 5, 1966, he told him he had left the drive-in theater at approximately 11:00 P.M. and driven to his home. He drank some beer and whiskey and watched television, but remembered nothing further until he saw his father sitting beside him at about 4:00 A.M..

A physician testified that at approximately noon on December 5, 1966, he treated defendant for cuts on both wrists. He could not state what caused the cuts, except that they had been made by a sharp object.

Defendant's testimony consisted of a denial of the charges. A number of witnesses testified that defendant's reputation was good.

Relying upon People v. Gardner, 35 Ill. 2d 564, defendant argues that the testimony of the prosecutrix identifying him as her attacker is uncorroborated, and is not sufficient to sustain the conviction.

In People v. Brinkley, 33 Ill. 2d 403, at page 405, the Supreme Court said: "Where the identification of an accused is at issue in a criminal case, we have constantly reiterated the rule that the testimony of one witness is sufficient to convict, even though such testimony is contradicted by the accused, provided the witness is credible and viewed the accused under such circumstances as would permit a positive identification to be made."

The witness had ample opportunity to view her attacker, and the identification meets the test enunciated in Brinkley.

The record shows that the Mt. Vernon police photographed defendant, showed the pictures to the prosecutrix at the hospital where she was confined, no other pictures were shown her, and she identified him as her attacker. All of the issues raised by defendant

on this point are fully disposed of by the holding in Simmons v. United States, 88 S. Ct. 967 and need not be further discussed.

In The People v. White, 26 Ill. 2d 199, at page 202, the Supreme Court said: "We have held that the testimony of a prosecutrix, uncorroborated by other witnesses, may be sufficient to justify a conviction if such testimony is clear and convincing. (People v. Sciales, 345 Ill. 118, 120; People v. Freeman, 244 Ill. 590; People v. Andreanos, 323 Ill. 34.) If the testimony is not clear and convincing, then corroborative evidence must be produced to support her testimony as against the denial of the defendant. (People v. Scott, 407 Ill. 301; People v. Ritchie, 401 Ill. 542.) In People v. Schiro, 361 Ill. 117, we said (p. 120): 'We have repeatedly held that where a conviction of rape, statutory or otherwise, depends upon the testimony of the prosecuting witness and the defendant denies the charge, the evidence of the prosecutrix should be corroborated by some other evidence, fact or circumstance in the case'."

The description broadcast by the police almost immediately after the victim was found, her description of the car in which she was transported and the premises in which she testified the rape took place, and the fact that defendant owned a pistol of the same caliber as the bullets removed from the victim's head, are corroborative of her testimony.

Relying upon People v. Kepler, 76 Ill. App. 2d 135, defendant argues that the corpus delicti of the crime of rape was not proved beyond a reasonable doubt. It is true, as defendant contends, that when she was first found by the police she complained of being abducted, choked and shot, and made no mention of being raped. The physician who was called in the early morning of December 5, shortly after she was found, testified that when he saw her she was semi-

comatose, and would drift from near consciousness to unconsciousness. The neurosurgeon who removed one bullet from the prosecutrix' head testified that when he saw her at 11:00 A.M. on the morning of December 5, 1966, she told him that on the previous night she had been abducted and attacked. Under the circumstances the evidence is sufficient to sustain the verdict of guilty. People v. Ritchie, 36 Ill. 2d 392.

Defendant contends that the court erred in giving, over his objection, an instruction defining the term "malice". Defendant argues that malice is not an element of any of the offenses charged, another instruction given on behalf of The People defined "intent" and the error is so prejudicial as to require reversal.

The term "malice" is not included in, or defined in the Criminal Code of 1961. The intent to commit the specific offense is an element of the crime of Attempt, and either intent or knowledge is an element of the crime of Aggravated Battery.

The instruction is an abstract definition of the term "malice", and although since the enactment of the Criminal Code there is no reason to give it, we fail to see how it could in any manner have prejudiced defendant.

The People's Instruction number 11 deals with the matter of evidence of good reputation. An instruction on the same issue was given for defendant. Considering the instructions as a series, the jury were adequately and correctly instructed and the errors, if any, do not warrant reversal.

Defendant refers to some 40 places in the abstract which it is contended reflect prejudicial error in rulings on evidence, or improper conduct on the part of the State's Attorney. An examination of the matters referred to shows that in most instances the court

sustained objections and instructed the jury to disregard the testimony, and the error, if any, on the rulings was harmless.

Defendant contends that the three charges arise out of the same conduct and the court erred in imposing more than one sentence. We agree, as apparently did the trial court, that no sentence should be imposed upon the judgment of guilty on the charge of Aggravated Battery. Clearly the aggravated battery and rape resulted from the same conduct, but the rape and attempt to murder are separate and distinct offenses. People v. Weaver, 93 Ill. App. 2d 311. The court properly imposed no sentence for the aggravated battery and did not err in sentencing defendant on the rape and attempt convictions.

Defendant has argued other matters which were not brought to the attention of the trial court or preserved for review. We have reviewed the alleged error and hold that under People v. Bradley, 30 Ill. 2d 597, and Supreme Court Rule 615(a), they do not warrant further consideration.

Defendant argues that the trial court erred in denying his motion for a psychiatric examination of the prosecuting witness. There is authority which supports defendant's position (see Ballard v. The Superior Court of San Diego County, 49 Cal. Rptr. 302, 410 P. 2d 838, and 3 Wigmore, Evidence (1940) § 924a and authorities discussed therein.), but the court did not err in its ruling. People v. Nash, 36 Ill. 2d 275.

Defendant contends that the punishment is excessive. We have examined the testimony taken at the hearing in aggravation and mitigation and agree that the occurrence may well be a single aberration in an otherwise law-abiding life. This, however, does not extirpate from the record the commission of a crime of violence for which the punishment imposed is not too severe. The sentence

is in accord with our opinion in The People v. Lillie, 79 Ill. App. 2d 174.

Upon examination of the entire record and review of the contentions of the parties, we conclude that there is no error shown which warrants reversal of the judgments, except that for the reasons above set forth, the judgment entered upon the count charging Aggravated Battery should be reversed. Accordingly, the judgments of conviction for Rape and Attempt are affirmed and the judgment of conviction for Aggravated Battery is reversed.

Judgment affirmed in part and reversed in part.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

51612

102 I.A.2 176

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM CIRCUIT COURT COOK COUNTY
vs.	)	
ALBERT LAWRENCE (Impleaded), Defendant-Appellant.	)	HONORABLE RICHARD J. FITZGERALD, Presiding.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Defendant was indicted for the crime of robbery. After a bench trial he was found guilty and sentenced to a term of four to six years in the penitentiary.

The defendant contends that an oral admission was not entitled to any weight, and further contends that the defendant was not proven guilty beyond a reasonable doubt.

At about 1:00 A.M. on January 6, 1966, Abraham Malveaux went to a liquor store or tavern in the 3800 block on Cottage Grove Avenue in Chicago. He noticed a small group of men standing near the store. Malveaux entered the store and purchased two bottles of wine which he carried out in a paper bag. As he began returning home two men grabbed him and pushed him into a hallway. They told him to face the wall and he got a glimpse of one of them who menaced him with a pistol. This so-called pistol proved to be a pistol cigarette lighter, which the other assailant named Wright held to his back while the defendant went through his pockets and removed a nickel. Malveaux asked for his eyeglasses which had fallen in the struggle outside the hallway, and the defendant went to get them. Malveaux testified that just about the time the defendant stepped outside a police officer grabbed him and another police officer came in the hallway. The police officer who entered the hallway engaged in a tussle with Wright, the other man who accosted Malveaux, during which the police officer fired a shot and Wright dropped Malveaux's wine bottles which he had been holding.

Officer Willie Williams testified that on January 6, 1966, at about 1:15 A.M., he was riding in a squad car northbound on Cottage Grove Avenue. As the car approached the 3800 block on Cottage Grove he saw two men pull a third man into a hallway. Williams and his partner stopped the squad car two doors north of the hallway and jumped out to investigate. As he headed for the hallway he saw the defendant emerge from the door. Officer Williams testified that the defendant was one of the men he had observed enter the hallway less than a minute previously. The defendant saw the police officer and walked toward him. Officer Williams interrogated the defendant and searched him. The search disclosed a number of nickels in the defendant's pocket, among other items. Williams stated that he did not personally observe the defendant robbing anyone, but that after the defendant was apprehended on the sidewalk Malveaux identified him as the man who had robbed him in the hallway. Williams further testified that he went over to the place near the curb and saw a pair of eyeglasses belonging to Malveaux, which glasses were broken as if they had been stepped on. The police officer searched the defendant and found an open knife in his left coat pocket and a glass cutter in his right pants pocket.

Police Officer Everett Gully was driving the squad car occupied by Officer Williams and himself. Officer Gully testified that he also observed two men force a third man into a vestibule; that he stopped the car, got out and headed for the building. He saw the defendant leave the hallway and found a second man standing in the vestibule holding a pistol type cigarette lighter. He subdued the second man, who was identified as Servan Wright. After the arrests Gully asked Malveaux if he could identify the defendant as one of the

robbers. He further testified that Malveaux then pointed to the defendant and stated that the defendant was one of the men who forced him into the hallway. Malveaux further stated that the defendant was the one who went through his pockets, and that Wright was holding the bag with the bottles of wine which he had taken from Malveaux.

Malveaux testified that all the time he was in the hallway he did not get a good look at the defendant. Malveaux also testified that the defendant searched him while the defendant was on Malveaux's left side and that he did not look at the man's face. He testified that the police officers saw the man when they grabbed him. Malveaux also indicated that he could hardly see out of one eye and that he was also near-sighted. He further stated that he could not see too well out of the other eye. During the trial one of the lenses was missing from his eyeglasses and the other one was cracked. During the trial of the case Malveaux was unable to identify the defendant in the courtroom.

Officer Gully during his testimony identified the defendant and testified that he was the man who came out of the doorway just before Gully entered the hallway. Gully persisted in his testimony that Malveaux pointed to the defendant after Gully had left the hallway with the other man, and that Malveaux stated that the defendant was one of the men who forced him into the hallway.

Police Officer Lucio Bitoy testified that on January 6, 1966, he had a conversation with the defendant in the presence of Officers Gully and Williams, Mr. Malveaux and Bitoy's partner. This occurred in the 21st District Police Station. Bitoy further testified that the defendant said, when asked what he knew about the occurrence, that "He did it and this was the

first time he ever did anything like that." Bitoy also testified that he made a report regarding his investigation; he had made a notation in his report to the effect that the defendant had admitted the crime. The report was produced in court.

On cross-examination Bitoy's testimony as to the admission made by the defendant was not shaken, and Bitoy stated that he remembered exactly the words he used.

The defendant testified that on January 6, 1966, he was walking on Cottage Grove toward his mother's house when he was arrested. He also stated that while he knew Servan Wright, the man who was arrested in the hallway, he was not in his company at that time. He also denied that he engaged in the robbery of Abraham Malveaux. He denied making any oral admission at the police station, and stated he told the officers "I never held up anybody. I never stuck up anybody."

Detective Rudolph Winston, called as a rebuttal witness by the State, testified that he was present at the police station on January 6, 1966, when the defendant stated that he participated in the robbery and he had stated that that was the first time this had happened. He further testified on cross-examination that the defendant admitted the robbery but that he did not recall the exact words used by the defendant.

The defendant, in support of his argument that the oral confession carried no weight, argued that the reliability of such testimony was so weak as to deprive the confession of any weight in arriving at a finding of guilty. It is further argued that the nature of an oral confession has many times been stated to be very dangerous and trial courts have been cautioned to consider such confessions only when they are

deliberately made and fully proved. No objection was made in the trial court to the confession or admission. When the testimony of the occurrence witnesses is taken into consideration, together with the testimony regarding the admission made by the defendant, it seems probable that the defendant felt that he had no alternative other than to admit his guilt.

The State argues that since the trial counsel for the defendant made no motion to suppress the oral confession made at the police station, and since no objection was interposed in the trial court after evidence of the admission was introduced, the defendant had waived the objection on appeal.

The defendant does not attack the admissibility of the oral confession as error but contends that it was not deliberately made or fully proved and therefore should not have been considered by the court in making its finding. During the oral argument held in this case the defendant frankly admitted that he was not attacking the admissibility of the confession because it was not objected to in the trial court, but contended merely that the confession was not deliberately made or fully proved.

Defendant cites People v. LaCoco, 406 Ill. 303. In that case the defendant contended that his confession was obtained by duress. The court in that case held that even though there may be evidence of the use of force to induce a confession, nevertheless, if there are sufficient facts to show the confession was voluntarily made, the admission of the confession does not constitute an abuse of judicial discretion. The court also stated in that case that verbal confessions are of low evidentiary value only because the testimony of witnesses as to a verbal admission is frequently subject to im-

perfection and mistake. Continuing, the court said at page 311:

> "On the other hand, where, as here, the testimony of numerous witnesses shows that the confessions were deliberately made and there is substantial agreement as to the details of the oral statements, oral confessions constitute satisfactory evidence."

The evidence in the instant case was testified to by two of the police officers present at the station on the night of the arrest. The only evidence refuting the testimony of the police officers was that of the defendant himself. In addition to the testimony relating to the admission by the defendant, the police report made during the night of the arrest showed that the defendant had admitted the crime.

We have read the numerous cases cited by the defendant and are satisfied that they are all distinguishable from the case at bar regarding the weight to be given the admission in this case.

Defendant next argues that the defendant's guilt was not established beyond a reasonable doubt. In support of this argument the defendant states that the victim was unable to determine who his assailants were because in the hallway he heeded his assailants' orders to face the dark wall without turning to look at either robber. The defendant argues that no lineup or showup was held; that the victim in court made an unsuccessful attempt to identify the defendant as one of his assailants. The victim, however, referred to the defendant as "Albert" and it was learned that the victim obtained the defendant's first name at the police booking and from the court's subpoena.

It is also argued by the defendant that the prosecuting witness never pointed out the defendant as a robber. This last statement was refuted by the testimony of Police Officer Willie Williams, who testified that the complaining

witness identified the defendant and that he said the defendant had robbed him in the hallway. Officer Everett Gully also testified that on the sidewalk, after the arrest, he asked Malveaux, the complaining witness, whether or not he could identify the defendant as one of the two men who robbed him. Gully testified that Malveaux pointed to the defendant and stated that he was one of the men who forced him into the hallway.

As to defendant's argument that no lineup or showup was held, it has been repeatedly held that neither a lineup nor showup is essential to prove identity of the defendant. In People v. Boney, 28 Ill. 2d 505, 509, the court said:

> "However, 'There is no requirement in the law that an accused person must be placed among a group of persons for the purpose of testing the ability of a witness to identify him as the guilty person,' (People v. Crenshaw, 15 Ill. 2d 458, 464), and the manner 'does not render the identification testimony incompetent, but only goes to the weight of the evidence.' (People v. Mikka, 7 Ill. 2d 454, 458-9; People v. Washington, 26 Ill. 2d 207,210.)"

The defendant argues that the victim wandered around the courtroom in an unsuccessful attempt to find and identify the defendant as one of his assailants. On the night of the holdup the victim's glasses were not broken until after he had been accosted by the robbers. He was wearing his glasses at the time and would have had an opportunity to see the men who grabbed him. After he was pushed into the hallway he obeyed their command not to look around. On cross-examination Malveaux testified that he did not look at the man's face; however, there is nothing to indicate that he did not look at the robbers while on the sidewalk when he was first approached. Since he was wearing glasses at the time he was approached some credence must be given to his on-the-scene identification, as testified to by the police officers.

In People v. Lawrence, 72 Ill. App. 2d 1, at page 5, the court, in commenting on the contention that the descriptions given by the victims of their assailants were too general and could fit thousands of other persons, stated:

> "Defendant next contends that the conditions under which the identification was made were poor. Defendant points out that complainant could not have seen his assailant for more than one minute and that he was unable to give the police a description of his assailant's facial features. Defendant also points out that complainant had failing eyesight and had to wear bifocal glasses. We agree with the State that positive identification does not require in depth reflection. The closeness and direct facing of the parties involved in this encounter afforded more than sufficient opportunity for identification."

There can be no question but that the victim's eyesight was poor, and that his opportunity for extensive observation was lacking, but these two elements do not necessarily overcome his on-the-scene identification.

We might say in passing that despite the fact that Malveaux's eyesight was poor he apparently had no difficulty walking at night with the aid of his glasses. While his eyesight unaided by glasses was poor, with the aid of his glasses it was sufficient to identify his assailants at close quarters before they were broken.

While a faulty identification may be contributed to by a substantial period of elapsed time, in the case before us an identification was made by three witnesses almost immediately after the commission of the crime. Malveaux also testified that when he was wearing his glasses "I would see."

It is true that at the trial Malveaux stated his eyesight was poor. It is also true he was unable to make a courtroom identification of the defendant. However, at the trial the eyeglasses that he was wearing had one lens entirely missing

and the other was cracked. This, no doubt, explained his failure to pick out the defendant in the courtroom.

Defendant, again, has cited numerous cases going to the question of identification, wherein the courts have reversed convictions. Each of them, in our opinion, is distinguishable from the case at bar. Officer Williams had seen the defendant enter the hallway, and both Officer Williams and Officer Gully saw him as he came out. Officer Williams testified that he had seen the defendant pushing Malveaux into the hallway as Williams approached in the squad car. The squad car was in front of 3811 or 3813 Cottage Grove Avenue. The hallway was at 3815 Cottage Grove Avenue. Officer Williams was sitting on the right-hand side of the front seat of the police car. The assault took place on the east side of Cottage Grove as the police car was cruising in a northerly direction. Williams was in an excellent position to see the persons who were assaulting the victim, before the victim was pushed into the hallway.

The defendant has also cited numerous cases dealing with an opportunity for definite identification and the ability to observe so as to make a definite identification. All of these cases are distinguishable on their facts from the case at bar. The defendant was observed by Officers Gully and Williams both before and after the robbery, and the victim corroborated that identification.

Based upon the foregoing, we conclude that the oral admission or confession was properly considered by the court, and that defendant's guilt was proven beyond a reasonable doubt.

JUDGMENT AFFIRMED.

DEMPSEY, P.J., and SCHWARTZ, J., concur.

No. 52018

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
v.	)	COOK COUNTY.
	)	HON. HERBERT C. PASCHEN,
WILLARD McLAURIN, Defendant-Appellant.	)	JUDGE.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

In a jury trial the defendant was found guilty of attempted rape and sentenced to serve a term of ten to fourteen years in the State Penitentiary. On appeal he contends that he was not proven guilty beyond a reasonable doubt. The facts follow.

Mrs. Bernice Mabry testified that on April 25, 1966, at about 2:00 a.m., she was walking home along 71st Street in the City of Chicago. At Eggleston Avenue the defendant, whom she had never seen before, approached her and attempted to strike up a conversation. She told him she did not want to talk to anyone and that she wanted him to leave her alone. Defendant continued talking and followed her four or five blocks to her apartment at 6526 South Ross Avenue. She said nothing to him except to ask him to leave her alone. When she reached the apartment building in which she lived the defendant asked whether he could go inside with her and she replied, "No." The defendant then grabbed her from behind and put one hand over her mouth. She bit his finger and screamed. He then dragged her down some stairs into a gangway below the building. He told her he wanted her and was going to have her. She struggled with him but he pulled up

her skirt and pulled down her panties. She pleaded with him not to touch her and told him she had just had a baby and had fifteen stitches taken in her, but defendant continued "to do what he wanted to do." A few minutes later a policeman flashed his light from the front of the gangway and another policeman appeared at the rear of the gangway. They arrested the defendant.

The police officers, Louis Pote and Thomas Hoban, testified that on April 25, 1966, they were on duty together and at 2:00 a.m. they received a radio call that a woman was screaming for help at 65th Street and Ross Avenue. At the time they received the call they were about two and a half blocks away and proceeded immediately to that address. Upon arrival they alighted from the squad car and Pote went to the front of the building while Hoban went to the rear. Pote testified that he observed the defendant and Mrs. Mabry in the gangway, that defendant was dragging the victim toward the rear of the gangway and that she was struggling with him, that her dress was above her waist and her panties were halfway down. Pote drew his revolver, ordered defendant to halt and arrested him. The victim was taken to the hospital where she received emergency first aid for abrasions on her leg, ankle and shoulder. It is defendant's contention "that the police came upon the scene and the complainant upheld her 'honor' by claiming the defendant was attempting to rape her." While defendant makes this contention, neither he nor any other person testified on his behalf at the trial.

Defendant's contention finds no support in the facts. Officers Pote and Hoban testified that they came to the scene

because of a police report that a woman was screaming for help. When they arrived Pote saw Mrs. Mabry struggling with the defendant as he dragged her to the rear of the gangway. He further testified that the victim was treated at the hospital for abrasions on her leg, ankle and shoulder. Mrs. Mabry testified that just prior to the incident she had had fifteen stitches taken after giving birth to a child, and this fact was not contested. In the face of this uncontradicted evidence no credence can be given to defendant's contention that Mrs. Mabry consented to having sexual relations with him in a gangway directly outside the apartment building in which she resided. The offense charged was proven beyond all reasonable doubt.

JUDGMENT AFFIRMED

DEMPSEY, P.J. and SULLIVAN, J. concur.

No. 52-407

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

IN THE MATTER OF THE APPLICATION OF THE COUNTY COLLECTOR FOR JUDGMENT AND SALE AGAINST LANDS AND LOTS RETURNED DELINQUENT FOR NONPAYMENT OF GENERAL TAXES FOR THE YEAR 1962 AND PRIOR YEARS.

MATTIE COLEMAN BURLESON,	)
	)
Petitioner-Appellant,	)
	)
v.	) Appeal from the
	) Circuit Court of
GERALDINE D. HOFFMANN,	) Cook County, Illinois,
	) County Department,
Respondent-Appellee.	) County Division

Hon. James E. Murphy

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT:

This is an appeal from an order of the Circuit Court of Cook County. The court below on motion of appellee dismissed the Petition of Mattie Coleman Burleson, Petitioner, under Section 72 of the Illinois Civil Practice Act, (ch. 110, Ill. Rev. Stat. 1965) to set aside an order previously entered directing issuance of a tax deed to Geraldine D. Hoffmann, Respondent.

The subject property is located at 6612 S. Rhodes Avenue in the City of Chicago and is improved with a two-story brick building. In 1952 Adam Coleman created a joint tenancy with rights of survivorship between himself and his children, namely: Bessie Coleman, Adam Coleman, Jr., Ernest Coleman,

Mattie Coleman Burleson, and Carrie Coleman Marchbanks. Ernest Coleman, Bessie Coleman and Carrie Coleman Marchbanks had all died prior to the commencement of any of the proceedings herein involved. Adam Coleman died on or about April 20, 1967.

In January of 1964, the County Collector of Cook County filed an application for judgment and order for sale of the subject property for failure to pay the second installment of the 1962 general real estate taxes. On February 11, 1964, the subject property was sold at public auction to the Bonded Municipal Corporation. Subsequently, the certificate of purchase was assigned to one Fred M. Horne, who filed a petition for tax deed on July 25, 1966. Personal service of the notices required by the Revenue Act were had upon Mattie Coleman Burleson, Petitioner, who was at that time residing on the premises. Notices were mailed to Bessie Coleman, Adam Coleman, Jr., Carrie Coleman Marchbanks and Mattie Coleman Burleson. No notice was served upon or mailed to Adam Coleman. One of the affidavits in support of the application for tax deed stated that the person in whose name the real estate was last assessed for taxes was Adam Coleman, Jr. In fact, the name of the person in whose name the real estate was last assessed was Adam Coleman, the father. It appears that Adam Coleman had also paid the 1963, 1964 and 1965 general real estate taxes.

On December 1, 1966, Fred M. Horne assigned his certificate of purchase to Geraldine D. Hoffmann, Respondent, who substituted as the tax deed petitioner. On February 17, 1967,

the trial court entered an order finding compliance with the requirements of the Revenue Act and directed issuance of the tax deed to Mrs. Hoffmann. On May 9, 1967, Mattie Coleman Burleson filed her petition pursuant to Section 72 of the Civil Practice Act seeking to set aside the tax deed.

It is the position of Mrs. Burleson that the naming of her brother, Adam Coleman, Jr., as the assessee of the general real estate taxes constituted fraud upon the court, when in fact her father, Adam Coleman, was the assessee. Secondly, it is Mrs. Burleson's position that she is entitled to relief because of the failure to have served her father with the necessary notices.

It is Mrs. Hoffmann's position, first that Mrs. Burleson has failed to show her freedom from negligence in not appearing and defending against the order complained of: that fraud cannot be inferred merely because Adam Coleman, Jr. was named the assessee of the general real estate taxes rather than Mrs. Burleson's father; and finally, that Mrs. Burleson, having been served herself with notice, cannot complain that service was not made on one who has not joined in her petition. Mrs. Hoffmann responded to Petitioner's Section 72 petition with motions to strike and dismiss pursuant to Sections 45 and 48 of the Civil Practice Act.

It is well established that a trial court cannot reverse its own order or judgment and correct the same either as to any question of fact found or decided by the court or as to any

question of law decided by it after the expiration of thirty days. Brockmeyer v. Duncan, 18 Ill. 2d 502, 505; Chapman v. North American Ins. Co., 292 Ill. 179.

A petition under the present Section 72 of the Civil Practice Act supplants various ancient common law writs designed to bring certain matters to the attention of the court which has entered a judgment more than 30 days after the entry of such judgment. However, a party may not avail himself of the remedy provided by Section 72 unless he shows that through no fault or negligence of his own the error of fact, the fraud, or the existence of a valid defense was not made to appear to the trial court. Such petition is not intended to relieve a party of the consequence of his own mistakes or negligence. Esczuk v. Chicago Transit Authority, 39 Ill. 2d 464, 467. In tax deed proceedings, the court has held that a Section 72 proceeding may not be used to relitigate any issue already passed upon by the trial court in the absence of fraud. Urban v. Lois, Inc., 29 Ill. 2d 542, 548.

In Dahlke v. Hawthorne, Lane & Co., 36 Ill. 2d 241, the Supreme Court stated at 244:

> "We have repeatedly held that in a tax-deed proceeding section 72 of the Civil Practice Act may not, in the absence of fraud, be used to again put in issue questions previously passed upon by the trial court, (citations omitted), such prior determinations being conclusive upon all parties and immune from collateral attack. (citations omitted) In so holding we have given effect to the 1951 amendment to

> section 266 of the Revenue Act, (citation omitted) which provides that tax deeds issued pursuant thereto shall be incontestable except by direct appeal. (citations omitted) Unlike the procedure which formerly prevailed, wherein the determination of statutory prerequisites for a tax deed was largely an administrative matter, it is now for the court, prior to ordering the issuance of such a deed, to judically determine whether the notice and other requirements have been met. And when a finding of compliance has been entered, it will thereafter be presumed that satisfactory proof of this fact was presented to the court even though such evidence is not preserved in the record. (citation omitted). "

In Zeve v. Levy, 37 Ill. 2d 404, a tax deed proceeding, the tax deed petitioner had failed to serve notice upon the property owner. In that case the process server for the tax deed petitioner served the occupants of the tax delinquent premises, who were contract purchasers. They informed the process server that the owner of the premises had moved to somewhere in California when, in fact, the owner had merely moved to another address in the City of Chicago. The trial court, after hearing evidence, denied the petition. On appeal to the Appellate Court, the order of the trial court was vacated. The Supreme Court, after granting leave to appeal, reversed the Appellate Court, affirmed the trial court and said at page 409:

> "It is clear that petitioner's failure to receive notice of the tax-deed proceeding does not, per se, entitle her to have the deed set aside. (Dahlke) Nor does the fact that respondent's agent could have made more thorough inquiry and a more diligent search than he did necessarily establish fraud on the part of respondent in the absence of proof of wrongful intent or a pattern of deception. (Dahlke). "

While a petition under Section 72 of the Civil Practice Act is filed in the original proceeding, it is the equivalent of the filing of a new action and it is necessary as in any new case that petitioner allege and be prepared to prove a right to the relief sought. Where the petition fails to state a cause of action or shows on its fact that petitioner is not entitled to the relief sought, it is subject to a motion to dismiss. Glenn v. The People, 9 Ill. 2d 335, 340. While it is true that a motion to strike or dismiss admits the truth of all well pleaded facts, together with all fair inferences to be drawn therefrom, such motions do not admit conclusions or inferences drawn by the pleader, unsupported by allegations of specific facts. In alleging fraud, the facts and circumstances should be set out clearly and concisely. In re application of County Treasurer, 84 Ill. App. 2d 456, 460.

Petitioner stresses that her father, while failing to pay the second half of the 1962 general real estate taxes, did pay all of the general taxes for 1963, 1964 and 1965. In Stanley v. The Bank of Marion, 23 Ill. 2d 414, 419, the Supreme Court said:

> "It is not mandatory that the certificate holder pay such taxes: rather, it is necessary only that they be paid prior to the issuance of deed. Were it not so, a property owner could forever prevent the issuance of a tax deed by the payment of a tax installment subsequent to sale. This would not only predicate an issuance of deed upon winning the race to the tax office, but would largely discourage the acceptance of tax titles by the public."

The Court in that case further went on to say at p. 420:

> "It is, of course, unfortunate that appellees have suffered the loss of their property be-

> cause of one year's delinquent taxes. It is clear, however, that they were fully informed of the sale and were afforded every opportunity to redeem or defend. Having failed to do so, they are in no position to collaterally attack the original tax proceedings."

Mattie Coleman Burleson, petitioner herein, had been personally served with notice of the application for the tax deed to the property of which she was an owner-occupant. There is nothing in her petition that would in any way excuse her from her own negligence in having failed to appear in that proceeding nor do the alleged irregularities of which she complains constitute fraud as there is no allegation that the irregularities of the petition for the tax deed or supporting affidavits were the result of a wrongful intent on the part of Mrs. Hoffmann nor were there any allegations indicating that Mrs. Hoffmann had embarked upon a pattern of deception in order to secure the issuance of this tax deed.

For the reasons set forth herein, the order of the trial court should be affirmed.

JUDGMENT AFFIRMED.

MORAN, J. and SEIDENFELD, J. concur.

52971

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	
v.	)	Court of Cook County.
	)	
ALFONZA TOWNSEND,	)	
	)	Francis T. Delaney, J.
Defendant-Appellant.	)	

Memorandum Opinion on Motion of Appellant to Vacate the Order Dismissing the Appeal For Want of Prosecution.

PER CURIAM.

The Public Defender was appointed to represent the defendant on appeal. The complete record in the case was filed on March 15, 1968. On April 19, 1968, three attorneys who are associated in the practice of law filed a motion stating that they were the defendant's attorneys and asked for an extension of time to June 2, 1968, in which to file the defendant's abstract and brief. On June 4th the three attorneys filed individual appearances for the defendant in substitution for the Public Defender. They were given leave to file the abstract instanter and were allowed until July 2nd to file the brief.

The brief was not filed on time and no extension of time in which to file it was ever requested. On September 26, 1968, the appeal was dismissed for want of prosecution.

On October 22, 1968, a motion to vacate the dismissal was filed. The motion was supported by the affidavit of one of the

attorneys who stated that various engagements totaling thirty days and an illness of ten days duration, in the period from June 4th to September 26th, prevented him from preparing the brief. No explanation was offered why a motion for an extension of time was not filed during that period.

Co-counsel for the defendant did not explain why the brief was not prepared by either of them or why they did not seek further time in which to do so.

The motion to vacate the order of dismissal is denied.

NO. 67-139

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

1021.A.2319-1

COMBINED INSURANCE COMPANY OF AMERICA, an Illinois Insurance Corporation, Plaintiff-Appellee, vs. THE CITY OF NOKOMIS, a Municipal Corporation, Montgomery County, Illinois, Defendant-Appellant.	Appeal from the Circuit Court of Montgomery County. Honorable Daniel H. Dailey, Judge Presiding.

Goldenhersh, J.

Defendant, The City of Nokomis, appeals from the decree of the Circuit Court of Montgomery County holding an ordinance[1] unconstitutional and invalid, and restraining it from enforcing the ordinance "insofar as it pertains to plaintiff and its duly authorized agents".

In its complaint plaintiff alleges that it is in the business of issuing health and accident policies for customers within defendant's city limits, that defendant adopted its Ordinance No. 552 which makes it unlawful "for any person or corporation to sell or solicit for all policies of insurance and indemnity contracts from house to house or door to door in The City of Nokomis unless such person, firm or corporation shall submit written information at least five days prior to such selling or soliciting to the City Clerk stating the dates such sale or solicitation shall be made, setting out the specific sections of the city where such sale or solicitation shall be made and the name and address of the principal person, firm or corporation making such sale, solicitation or distribution and the names and

[1]The ordinance is reproduced as an Appendix to this opinion.

addresses of any salesmen who shall make any such sale, solicitation or distribution".

Plaintiff alleged further that one of its officers was told by defendant's Mayor that defendant intended to enforce the ordinance against plaintiff's agents.

Plaintiff's assistant vice president testified that he talked with defendant's Mayor by telephone, told him the ordinance had been called to plaintiff's attention, and asked if it would affect plaintiff. The Mayor replied that "it would cover our people as well as anyone else", and violators would be picked up, taken to jail and held until bond was posted.

The testimony shows that plaintiff does not send premium notices through the mail; its agents make personal contact with its policy holders, and while collecting premiums solicit new business. It has been supplying its agents with letters for presentation to defendant's City Clerk five days prior to calling on policy holders.

Defendant argues that under the provisions of Chapter 24, Sections 11-1-1 and 11-5-1 of the Cities and Villages Act (Ch. 24, Ill. Rev. Stat.), the enactment of the ordinance is a proper exercise of its police power.

Plaintiff contends that the ordinance is void and unconstitutional, and defendant has no authority to regulate the insurance business of plaintiff, or the activities of its agents, for the reason that the State of Illinois, by legislative enactment, has preempted the regulation of the insurance industry and agents.

The first question for determination is whether the record reflects an "actual controversy" as required by section 57.1 of the

Civil Practice Act. (Ch. 110, sec. 57.1, Ill. Rev. Stat. 1967). Applying the definition of the term found in Exchange National Bank v. County of Cook, 6 Ill. 2d 419, 422, to the facts here presented we hold that there exists an actual controversy determinable by declaratory judgment.

It is apparent from the undisputed testimony that the activities in which plaintiff's agents engage are not within the scope of the "house to house" or "door to door" provision of the ordinance and the ordinance, therefore, is inapplicable to plaintiff's operations.

Our Supreme Court has held that it will not decide the constitutionality of an ordinance where the case can be decided on other grounds. Osborn v. Village of River Forest, 21 Ill. 2d 237. In Navickas v. Lawrence Hall, Inc., 85 Ill. App. 2d 43, the Appellate Court said at page 49: "A reviewing court will not consider questions or contentions which we deem not essential to the determination or final disposition of the case before it." In Gannon v. C. M. St. P. & P. Ry. Co., 22 Ill. 2d 305, the Supreme Court, in discussing Griffiths & Son Co. v. National Fireproofing Co., 310 Ill. 331, said at page 313: "Since some of the language in that case relative to the Scaffold Act was not necessary to the decision, it was not deemed binding in view of the principle that a judicial opinion is authority for only what is actually decided. Village of Lombard v. Illinois Bell Telephone Co., 405 Ill. 209."

In deciding this case, it was not necessary that the trial court consider the validity of the ordinance, and obviously no constitutional issue is presented. If the language of a decree is broader than justified, it will be limited by construction so that its effect

is such as is needed for the purposes of the case. The People v. LaMothe, 331 Ill. 351. Applying this rule we hold that insofar as the decree purports to hold the ordinance invalid or unconstitutional, it is inoperative and of no effect. To the extent that the decree enjoins and restrains defendant from enforcing the ordinance as to the activities of plaintiff and its agents the decree of the Circuit Court of Montgomery County is affirmed.

Decree Affirmed.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

APPENDIX

ORDINANCE NO. 552

Be It Ordained by the City Council of the City of Nokomis, Montgomery County, Illinois:

Section I. That it shall be unlawful for any person, firm or corporation to at any time hereafter, sell, solicit or distribute any goods, wares, or merchandise, including newspapers, magazines, all policies of insurance, indemnity contracts, and tickets to any social or athletic events from house to house or from door to door in the City of Nokomis, Illinois, unless said person, firm or corporation shall at least five (5) days prior to the selling, soliciting or distributing of said above named items submit written information to the City Clerk of the City of Nokomis, Illinois, stating the dates said sale, solicitation or distribution of the above named items shall be made, setting out the specific sections of said city where said sale, solicitation or distribution of said items shall be made, and the name and address of the principal person, firm or corporation making said sale, solicitation or distribution and the names and addresses of the salesmen, if any, who shall make such sale, solicitation or distribution of said items.

Section II. This Ordinance is not intended to regulate the sale or solicitation of the above stated items but is adopted under the police powers of the City of Nokomis, Montgomery County, Illinois.

Section III. Any person, firm or corporation violating any provisions of this Ordinance shall be fined not less than Twenty Five Dollars ($25.00) nor more than One Hundred Dollars ($100.00) for each offense.

Section IV. Any Ordinance or Ordinances in conflict with this Ordinance is hereby expressly repealed.

Section V. This Ordinance shall become effective ten (10) days after its publication as provided by law.

52990

102 I.A.2 3-2-2

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. MORRIS FIDDLER, Defendant--Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY. HON. RICHARD J. FITZGERALD, Presiding.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was charged under a two count indictment with the strangulation murder of Jayne Levin. He was found guilty by a jury and sentenced to a term of twenty to thirty years in the penitentiary. He appeals.

On the date of her death, Jayne Levin was sixteen years of age and attended high school in Chicago. She and defendant, aged seventeen, had "gone steady" for several years.

Raymond Cunningham, the owner and operator of a garage located in the 4500 block of North Elston Avenue in Chicago, testified that about 5:30 P.M. on June 3, 1966, he was in the office of the garage when defendant entered the garage from the alley entrance and requested permission to use one of the washrooms. Cunningham stated that defendant was holding his stomach and complaining that he was sick. Defendant spent three minutes inside the washroom, during which time he made sounds as if ill. Defendant thereafter left the building by way of the same alley exit, but returned several minutes later in an agitated, excited state. He requested Cunningham to accompany him to the alley because he thought "someone has murdered my girl friend, she is turning blue." Cunningham testified that he told defendant he was unable to leave the office, but that he would notify the police. Defendant again left the building by the alley exit, and a customer entered the garage office and engaged Cunningham in conversation. Defendant returned a third time, five or six minutes later, and requested Cunningham to go into the alley and check

his girl friend's pulse. At this time the police and fire ambulance were summoned.

Approximately 5:45 P.M. on the date in question Chicago Firemen Foley and Thomas, assigned to a fire department ambulance, received a call to proceed to the vicinity of Elston and Kennicott Avenues in the city. Upon their arrival at the scene, they observed defendant at the mouth of an alley 100 feet from the intersection of Elston and Kennicott Avenues. Defendant appeared to be "highly agitated" and stated to the firemen that his girl friend was "sick" in his parked automobile several hundred feet into the alley. Fireman Thomas testified that defendant ran in front of the ambulance as it proceeded into the alley toward the parked automobile, shouting "come on, hurry up, hurry up, down by the parked car." Police Officer Liszkowski, one of the police officers summoned to the scene, testified that defendant was running back and forth between the ambulance and the squad car which had entered the alley behind the ambulance, shouting "something happened to his girl friend in the car, that he thought she was dead." Officer Wirkus' testimony was much the same as that of his partner, Officer Liszkowski, except that Officer Wirkus did not testify that he heard defendant shout that he thought Miss Levin was dead. Defendant's emotional state at this time was described by the witnesses as "hysterical," "agitated," "highly nervous," and the like.

The firemen and the policemen testified they looked into the parked automobile and observed Miss Levin's body in the front of the automobile on the passenger's side. The body was in a kneeling position on the floor, with the head face downward on the seat. As the body was being removed from the automobile onto a stretcher, Officer Wirkus noticed a handkerchief stuffed into its mouth. Fireman Thomas testified that he removed the handkerchief and that he asked defendant, "Who did this?" to which defendant replied, "I did." While Officer Wirkus stated he did not overhear any conversation between defendant and the others at the scene, Fireman

Foley testified that Fireman Thomas had no conversation with the defendant other than to ask him who stuffed the handkerchief into the deceased's mouth, to which defendant replied, "I did."

Miss Levin's body was removed to Forkosh Hospital where a staff physician made an examination. An attempt was made to resuscitate Miss Levin for thirty minutes, but to no avail. The doctor testified that he was unable to say exactly when death occurred. He stated that he observed linear marks or abrasions moving in a circular pattern around the deceased's neck, apparently caused by some form of friction; this testimony was corroborated by a police technician and also by Fireman Foley. The physician was unable to state an opinion as to the cause of the marks and gave no opinion as to the cause of death.

Several police technicians ran various tests on the body of Miss Levin, her clothing, defendant's clothing, and the automobile from which the body was removed. Although there was no sign of sexual molestation and no apparent damage to clothing of recent origin, the deceased's knees and ankles were scraped and lacerated.

Doctor Reese Guttman, a specialist in diseases and disorders of the head area, testified that, in his opinion, ligature strangulation could not have been caused by the handkerchief found in the mouth of Miss Levin.

The only direct evidence of the cause of Miss Levin's death is a certified copy of the coroner's certificate of death issued by the county clerk. It appears from the record that the coroner's physician who performed the autopsy, Dr. Henry, was deceased at the time of trial. Over strenuous objection by the defense, the trial court allowed the certified copy into evidence on the ground that the Vital Statistics Act permits the introduction of such documents into evidence as prima facie evidence of the facts contained thereon. The document was admitted for the limited purpose of showing the cause of Miss Levin's death to be ligature strangulation.

Defendant first maintains that it was error to have admitted the certified copy of the coroner's certificate of death into evidence for the reasons that the coroner's certificate, as a statement of the cause of death, is not based upon the coroner's own medical examination and is therefore hearsay; that the county clerk's certified copy of the coroner's certificate is also hearsay as to the cause of death; and that neither document is given evidentiary status by statute.

Except as authorized by the Act, disclosure of information contained in vital statistics records by the party in custody of those records is prohibited by the Vital Statistics Act. Ill. Rev. Stat. 1967, Chap. 111-1/2, Para. 73-24. Section 25 of the Act generally designates those parties entitled to disclosure of such information. Ill. Rev. Stat. 1967, Chap. 111-1/2, Para. 73-25.

Subsections 1, 2 & 3 of Section 25 set out the requirements for obtaining a certification of birth or death. The certification shall disclose only the name, sex, date and place of birth or death of the subject party, and the registration number. It is specifically provided that none of the other data appearing in the vital statistics records shall be included in the certification, with one exception not relevant here.

Subsection 4 of Section 25, on the other hand, deals with a certified copy of a certificate of birth or death and provides that such certified copy shall be issued:

> "(a) Upon the order of a court of record; or
>
> * * *
>
> "(c) Upon specific written request by a department of the state or a municipal corporation or the federal government; or
> "(d) In case of a death . . . certificate, upon specific written request of a person, or his duly authorized agent, having a personal or property right interest in the record."

Subsection 6 of Section 25 provides that "[a]ny certification or certified copy of a certificate issued in accordance with this

Section shall be considered as prima facie evidence of the facts therein stated,. . ."

A consideration of Section 25 as a whole reveals that the legislature has drawn a distinction between a "certification" of a vital statistics record and a "certified copy of a certificate." "Certification" is defined as the "[a]ct of certifying, or state of being certified; attestation." (Webster's New International Unabridged Dictionary, 2d Ed.) The Vital Statistics Act specifically limits the matters which the county clerk may include in a certification, namely, the sex, name, place and date of birth or death of the subject party, and the registration number. A "certified copy," on the other hand, is defined as "[a] copy of a document or record, signed and certified as a true copy by the officer to whose custody the original is intrusted." (Black's Law Dictionary, 4th Ed., 1951, p. 287.) Subsection 4 of Section 25 provides that a "true copy" of a birth or death certificate may be issued to any of those parties therein named, without regard to the nature of the data appearing on the copy.

Prior to the enactment of the Vital Statistics Act in 1961, and until the year 1925, a coroner's certificate of death was admissible to show the fact and the cause of death in civil cases. See e.g., Foster v. Shepherd, 258 Ill. 164. All cases supporting this view, however, were expressly overturned in 1925 when it was held that those matters contained on the certificate of death were inadmissible as evidence of the cause of death. Spiegel's H. F. Co. v. Industrial Com. 288 Ill. 422; Plano Foundry Co. v. Industrial Com., 356 Ill. 186. While the issuance of both certifications and certified copies were controlled by Section 55 of Chapter 111-1/2 of the Illinois Revised Statutes prior to 1961, only the information contained on a certification was made admissible as prima facie evidence of such matters. See Ill. Rev. Stat. 1959, Chap. 111-1/2, Para. 55. The information

contained on a certified copy of a certificate, on the other hand, was presumably controlled by the case law as set out above concerning a coroner's certificate of death. All of the foregoing was obviated by passage of the Vital Statistics Act in 1961, which expressly provides that the information contained both on certifications of death and on certified copies of a coroner's death certificate constitutes prima facie evidence of such matters. Consequently, defendant's position, that the matters contained on the coroner's certificate of death and on the county clerk's certified copy thereof are merely hearsay and therefore inadmissible, is without foundation.

Defendant, however, maintains that the terms "certification of death" and "certified copy of a certificate" are used interchangeably throughout Section 25 of the Vital Statistics Act, so that the sole data contained in the vital statistics records which the county clerk may divulge is the name, sex, date and place of death of the subject party, and the registration number. Defendant concludes that the cause of death appearing on the certified copy of Miss Levin's death certificate was surplusage and therefore inadmissible as evidence since the Act does not give the county clerk the authority to divulge such information.

The statutory history of certifications of death and of certified copies of death certificates discloses a distinction consistently drawn between the two types of documents. Prior to the passage of the Vital Statistics Act, certifications of death were dealt with apart from certified copies of death certificates, and all matters contained thereon were given the status of prima facie evidence. Ill. Rev. Stat. 1959, Chap. 111-1/2, Para. 55. Although dealt with in the same section as certifications of death, prior to 1961, certified copies of death certificates received no such evidentiary status by the statute, but, rather, the evidentiary status of certified copies was governed by case law, as noted above. Under the Vital Statistics

Act of 1961, certifications of death are dealt with in subsection 3 of Section 25 of the Act and rules are set down as to what shall be contained thereon. Certified copies of certificates, however, are specifically dealt with in subsection 4 of Section 25. Subsections 5, 6, and 7 of Section 25 then continue this distinction between the two types of documents, referring to them as "[a]ny certification or certified copy" of a certificate. Although subsection 11 of Section 25 refers to "an original, certified copy, or certification of a certificate" in prohibiting custodians of vital statistics records from preparing or issuing any "certificate" other than as authorized by the Act, it appears that this is no more than inexact wording rather than the employment of the terms interchangeably as defendant suggests. Consequently, while a certification of death may contain only the name, sex, date and place of death of the subject party, and the registration number, a certified copy of a death certificate must, by its very nature, contain all information contained on the certificate itself, which, by statute, must contain the cause of death. See Ill. Rev. Stat. 1967, Chap. 31, Paras, 10.1, 10.4. The trial court did not commit error in admitting into evidence the certified copy of the coroner's death certificate as prima facie evidence for the limited purpose of showing the cause of Miss Levin's death.

Defendant next maintains that the trial court failed to strictly construe the Vital Statistics Act, which is in derogation of the common law, in that the provision in subsection 6 of Section 25, allowing certifications and certified copies to stand as prima facie evidence of the matters contained thereon, was permitted to encompass the disclosure information not permitted by subsection 3, namely the cause of death. This argument is again premised upon the erroneous theory that both certifications and certified copies of death certificates are treated equally and interchangeably in the Act. Nor can

it be heard that the admission into evidence of the certified copy, containing information concerning the cause of death whereas it appears that the coroner's physician who reported the cause of death is unavailable to testify, violates defendant's constitutional right to confront the witnesses against him. See People v. Love, 310 Ill. 558; People v. Dolgin, 415 Ill. 434, 450.

Defendant's final contention is that the trial court committed error in overruling his post-trial motions inasmuch as there was no competent evidence of the cause of Miss Levin's death, nor any evidence that defendant was the agency which caused her death. We disagree.

The certified copy of the coroner's death certificate introduced into evidence shows the cause of Miss Levin's death as ligature strangulation. The physician who examined the body upon its arrival at Forkosh Hospital, a police technician, and Fireman Thomas testified to linear marks going around Miss Levin's neck, which the physician testified were caused by some form of friction and which generally corroborates the ligature strangulation information contained on the certified copy of the death certificate. There is also evidence that defendant was in a highly excited and agitated state when requesting the aid of witness Cunningham and also when the police and firemen arrived at the scene. Cunningham testified that defendant stated he thought "someone has murdered my girl friend, she is turning blue." The handkerchief found stuffed into the deceased's mouth was placed there by defendant, Firemen Thomas and Foran testifying that, when asked who placed the handkerchief into the mouth, defendant replied, "I did." (The fact that a doctor testified that the handkerchief found in the deceased's mouth could not have caused the ligature strangulation is immaterial, since it does not appear that the State's case was based on the theory that the death of Miss Levin was the result of the handkerchief stuffed into her mouth.) The body was

found in the front seat of defendant's automobile, which was parked several hundred feet into the alley. We find that there was competent evidence of the cause of Miss Levin's death and conclude that from the evidence presented, the jury could reasonably have inferred that defendant caused her death.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

McNAMARA, J., and LYONS, J., concur.

NO. 68-33

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

SEVILLE PHILLIPS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of Franklin County.
	)	
vs.	)	
	)	Honorable William G. Eovaldi, Judge Presiding.
BRACY FOOD STORES, INC., a foreign corporation,	)	
	)	
Defendant-Appellant.	)	

Goldenhersh, J.

Defendant appeals from the judgment of the Circuit Court of Franklin County in the amount of $15,000.00 entered upon a jury verdict in plaintiff's action for personal injuries.

Plaintiff testified that at approximately 4:00 P.M. on December 16, 1966, her husband called for her at her place of employment and they drove to the parking lot adjacent to defendant's grocery store. Her husband parked their car in the lot, he went to a store in the vicinity, (not defendant's), and she walked to a drug store operated by her employer, to collect her pay, intending then to return and shop for groceries in defendant's store. She received a gift at the drug store and decided to put it in the car before doing her grocery shopping. As she walked toward the car she "started to step around" a hole in the surface of the lot, her foot slipped and she stumbled or fell into the hole which she described as "all of a foot deep". On cross-examination she stated that as she walked to the car, she looked "but I stumped my toe on that big rock and I went right in that hole". Asked whether she saw the rock she stated "Yeah. I thought I'd lift my foot up over it, but I didn't. I hit it with my foot, and I fell

down." She described the rock as "just a big piece of concrete, off of the sidewalk". The weather was bright and clear.

Plaintiff had been a customer at defendant's store over a period of several years and had been in the parking lot on a number of prior occasions.

Defendant's manager, called under section 60 of the Civil Practice Act, described the lot as being approximately 60 feet by 100 feet, surfaced with crushed white rock over an original bed of creek gravel. The lot was in fair condition but there were some holes; the lot was used as a turning point for people going to the post office and there was a section that kept "chewing out".

Defendant contends the trial court erred in denying its motions for directed verdict and judgment n.o.v., and argues that plaintiff was familiar with the parking lot, knew its condition, had traversed the same area in order to go from the car to the drug store, and the evidence shows her to have been guilty of contributory negligence as a matter of law.

In Swenson v. City of Rockford, 9 Ill. 2d 122, in considering a similar contention, the Supreme Court said at page 127: "The use of a defective sidewalk by a person who has knowledge of the defect is not contributory negligence per se, and if, while walking upon that sidewalk, such person is in the exercise of ordinary care for his or her safety, there may be a recovery in case of an injury. (Wallace v. City of Farmington, 231 Ill. 232; City of Mattoon v. Faller, 217 Ill. 273.) Ordinary care has been defined to be that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances. Austin v. Public Service Co. of Northern Illinois, 299 Ill. 112.

In Village of Clayton v. Brooks, 150 Ill. 97, this court said: 'The law is, we think, well settled, that knowledge of the defect in the sidewalk, by the person injured, before he goes upon the same or before injury, does not per se establish negligence on his part. * * * "It is plain that one may exercise due care with full knowledge of the danger to which he is exposed or to which he lawfully exposes himself. This certainly is not contributory negligence."' In the same case (p. 106,) it was said, quoting from Sherman & Redfield on Negligence: 'The mere fact that a traveler is familiar with the road, and knows of the existence of a defect therein, will not impose upon him the duty to use more than ordinary care in avoiding it. * * * Such knowledge is a circumstance, and perhaps a strong one, but is should be submitted, with the other facts of the case, to a jury, for them to determine, whether, with such knowledge, the plaintiff exercised ordinary care in proceeding on a way known to be dangerous, or, in proceeding, used ordinary care to avoid injury.'"

Applying the rule of Pedrick v. Peoria and Eastern Railroad Co., 37 Ill. 2d 494, we hold that the trial court properly denied defendant's motions.

Defendant contends that the trial court erred in giving plaintiff's instruction number 8. The instruction is in the form of I.P.I. 20.01 and correctly states the issues made by the pleadings. Defendant argues that the instruction "erroneously told the jury that whether plaintiff was a licensee or invitee the defendant owed her the same duty of care." Defendant offered, and the court gave, instructions in the form of I.P.I. 120.05 and 120.08. Upon review of all of the instructions, we hold that the court correctly overruled defendant's objection to plaintiff's instruction number 8.

Defendant argues that the court erred in giving plaintiff's

instruction on damages because it included a paragraph in the form of I.P.I. 30.07. Defendant contends that the complaint contains no allegation of loss of future earnings, and the evidence showed her earnings at the time of trial were greater than before her injury. Although not stated in those terms, the language of the complaint alleges an impairment of plaintiff's ability to earn money in the future, and based upon the evidence which will be further discussed in the review of defendant's contention that the verdict is excessive, the court did not err in giving the instruction. Parnham v. Linder Co., 36 Ill. App. 2d 224; Buckler v. Sinclair Refining Co., 68 Ill. App. 2d 283.

Defendant contends that the trial court erred in overruling an objection made during plaintiff's counsel's closing argument. What has been said with respect to the alleged error in plaintiff's instruction on damages is here applicable, and the court did not err in its ruling.

Defendant contends the verdict is excessive. Plaintiff's treating physician testified that she suffered a fracture of the radius at the wrist with anterior displacement; it was reduced by traction and a cast was applied; she was hospitalized for one day; he saw her at intervals over a period of approximately 10 weeks; she complained of pain; she suffered some permanent restriction of the movement of the wrist.

Plaintiff testified that she suffered pain and was unable to do many types of housework which she had done both at home and for others prior to the injury; she did not work for two months, when she returned to work her arm "bothered her" so she quit her housework jobs and took a job in a restaurant; she cannot pick up a dish with her right hand, and she helped with the cleaning chores she could perform with her left hand.

The courts have repeatedly held that the amount of damages to be

assessed is peculiarly a question of fact for the jury, and if the jury is properly instructed on the measure of damages, an appellate court should not substitute its judgment as to the sum to be awarded in a given case, for that of the jury. Smith v. Illinois Cent. R. Co., 343 Ill. App. 593; Hulke v. International Mfg. Co., 14 Ill. App. 2d 5; Ford v. Friel, 330 Ill. App. 136.

We find no error which warrants reversal and the judgment of the Circuit Court of Franklin County is affirmed.

Judgment Affirmed.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

51714

Abstract

62 I.A. 434

SAM SORKIN, JULES ROSENBERG, JACK PORTNOY, DANIEL JESSER, PALMER GEVIRTZ and ALFRED KRITZ, et ux.,	APPEAL FROM
Plaintiffs-Appellees,	CIRCUIT COURT
vs.	COOK COUNTY
MAURICE J. LAZARUS, (Bernice Lazarus, deceased), SIDNEY GLASSBERG and DOROTHY R. GLASSBERG,	
Defendants-Appellants.	Honorable Walker Butler Judge Presiding

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THIS COURT:

This is an appeal from a decree in chancery in which the plaintiffs obtained equitable relief from the defendants. The parties may be generally characterized as neighbors, golfing partners, or social acquaintances. The suit arose over funds contributed by the plaintiffs to the defendants in the construction and operation of a rest home called "Eden View" - a project which resulted in a less than successful business enterprise.

The defendant Lazarus was the initiator and organizer of the enterprise. The defendant Glassberg was a member of a general contracting partnership which constructed the project and was paid for such construction. Some months after the contributions of the plaintiffs a limited partnership agreement dated November 1, 1962 was entered into by the participants and their respective spouses. The defendants were designated as general partners and the plaintiffs as limited partners. The complaint charged that the defendants were guilty of bad faith in either misrepresenting to or concealing from the plaintiffs material facts, inducing them to place their funds in the project, and that the circumstances created a fiduciary relationship which the defendants breached. The defendants deny the acts charged, assert that a debtor-creditor

relationship was created prior to the partnership agreement, that no facts material to a contribution of funds was either concealed from or misrepresented to the plaintiffs and that there was no breach of any fiduciary relationship.

Defendants attack the decree on the following grounds:

1. The evidence does not show the existence of a fiduciary relationship nor any breach thereof,

2. The evidence does not support a concealment from or a misrepresentation to the plaintiffs by the defendants of any material facts,

3. That the decree provided for personal judgments and other relief against the wives of the defendants where there is no evidence to support any concealment, misrepresentation or inducement of any kind on their part,

4. That the decree goes beyond the pleadings in this record and requires the defendants to reconvey to the partnership certain real estate, and

5. That all material facts were disclosed to, known by or readily available to the plaintiffs at the time the partnership contract was executed.

The partnership contract provided that it was organized for the purpose of acquiring the real estate described therein to operate a rest home on one parcel of such real estate; that the defendants as general partners should contribute $175,000 "in cash" and jointly acquire 68.4% interest in the entire project; share the profits and losses in that percentage until such time as the losses if any payable by the limited partners would exhaust their contributions and thereafter the general partners would bear the losses, share and share alike. The limited partners contributed $150,000 to the project in various amounts aggregating 31.6% and were to share in the profits and in the losses ratio-wise except that their losses were expressly limited to the amount of their respective contributions. The contract further recited that the title to the

real estate was in a Chicago bank as trustee with the beneficial interest owned by Lazarus for the benefit of the two defendants and was subject to a mortgage with an unpaid balance of $395,300. It was also provided that contributions of the limited partners should be applied, 50% to the purchase of their beneficial interest in the enterprise and 50% thereof as a loan to the partnership for which a debenture note was to be issued and delivered, payable five years after date and bearing interest of 6%. The note was payable only out of the assets of the partnership and did not become a liability of the general partners, but was entitled to priority before any liquidating distributions either to the general or limited partners. The management of the partnership was vested in the general partners with the proviso that on a sale of the partnership assets the consent of all the partners was required.

This agreement was recorded on January 17, 1963, as required. At the time of the contract the rest home had been in operation since the preceding March and was operating at a loss. The master in chancery specifically held that all prior negotiations, conversations, representations, warranties or undertakings were merged into the written agreement and that neither party could ratify or alter that agreement by parole testimony. This conclusion, we think, is abundantly correct and that it is not even debatable but that each of the parties occupied a fiduciary relationship, one with the other, from the date of the contract's execution. Rizzo v. Rizzo, 3 Ill. 2d 291, 120 N.E. 2d 546.

Plaintiffs have proceeded and pleaded on the theory that a partnership relationship existed from the time of the contributions by each of the plaintiffs and the defendants have proceeded on the theory that at the inception of the project a debtor-creditor relationship was created. This record establishes neither. The receipts given each of the plaintiffs when their contributions were made provided that they would receive a "percentage interest in the

fee and the operating company" and "a 6% debenture, interest payable annually". It further stated that if the proposed construction was not completed and operative within 12 months from the date of the receipt, it was agreed that the money of any contributor would be returned to him at his option. The subsequent record as well as the limited partnership agreement clearly indicates that 50% of the contribution of each plaintiff was to be investment and 50% was to be a loan. This precludes any proper conclusion that the entire arrangement was a debtor-creditor relationship.

It is likewise equally clear that neither a limited nor a general partnership between all of the parties was either originally created or intended. Plaintiff Gevirtz testified "when I first paid over my money to Lazarus, I did not know the quantity or names of additional investors in the Eden View project. I did not know whether there might be a corporation, general partnership, limited partnership or land trust. The type of entity was not uncertain in all major respects prior to November 1, 1962; I knew there were going to be participants in some form". Plaintiffs stipulated into the record that all other plaintiffs if called would testify substantially the same as Gevirtz with some variations not here material. The plaintiffs received interest on all of the money contributed prior to November 1, 1962, from the defendants. The plaintiffs came into the enterprise at different times and with a single exception had no voice in the selection of the other as is essential to the admission of a new partner. 29 ILP Partnership, § 191. Prior to the execution of the limited partnership agreement two of the original contributors were refunded their money by the defendants and stepped aside. Two of the plaintiffs did not make their full contributions prior to the date the rest home began operations and two came into the picture some two months after it began operations. Patently there was no written or oral agreement as to the partnership from the beginning of the contributions. To find that a partnership existed from the inception of

this agreement by implication is to be implication, establish a legal entity that was not then either determined or intended with people who were not then in any way connected with or related to the project. There was therefore no fiduciary obligation arising out of a partnership arrangement express or implied prior to November 1, 1962.

Although the dividing line between a partnership and a joint venture is sometimes nebulous and is basically purely technical, it nevertheless exists. In 30 Am. Jur., Joint Adventures, § 9, it is stated:

> "To constitute a joint adventure, the parties must combine their property, money, efforts, skill, or knowledge in some common undertaking. The contributions of the respective parties need not be equal or of the same character, but there must be some contribution by each coadventurer of something promotive of the enterprise. . . ."

This record clearly indicates that all of the parties were making contributions to this rest home, that it was a joint adventure intended or designed for the mutual benefit of all and that the legal entity or nomenclature to be ascribed to it was left to a future determination - a determination that ultimately resulted in the limited partnership. No matter what we may call it equity looks to the substance of the transaction, not to its form, and to this end numerous courts have held that a fiduciary relationship does not depend on nomenclature. Carroll v. Caldwell, 12 Ill.2d 487, 147 N.E.2d 69, 89 C.J.S. Trusts § 151, note 92, p. 1055; Ditis v. Ahlvin Construction Co. 408 Ill. 416, 97 N.E.2d 244. In Ditis v. Ahlvin Construction Co. 408 Ill. 416, 97 N.E. 2d 244, 249, it is stated:

> "A joint adventure may be established without any specific formal agreement to enter into a joint enterprise; it may be implied or proved by facts and circumstances showing such an enterprise was in fact entered into. 48 A.L.R. 1058."

We think it clear that in the period prior to the execution of the partnership agreement, a joint enterprise existed and that a fiduciary relationship was created between parties prohibiting secret dealings and preference of self in matters relating to and connected with the joint venture. Bakalis v. Bressler, et al., 1 Ill.2d 72, 115 N.E.2d 323.

In setting up the capital accounts of the limited partnership there is a variance of $202,240.31 between the actual cost and the transfer or ascribed cost. Specifically asked whether or not this was a fact, Lazarus testified that it was. The auditor for Eden View testified unequivocally that this was unknown to any of the plaintiffs or to him until sometime in March 1963, and in preparing the partnership income tax returns he and his associates came to the conclusion that the ascribed costs were considerably higher than the actual cost. This variation must be examined in the light of the fact that the defendants in this case were the managers of Eden View, both before and after the limited partnership was created and as such the heavier responsibility rested on them. See Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 62 ALR 1. In Meinhard is the oft-quoted language of Mr. Justice Cardozo where he said:

> "Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. . . . ."

This standard was approved by our Supreme Court in Bakalis. We turn now to the performance of the parties as tested by these standards.

Called by the plaintiffs, the auditor testified that the actual costs of construction were not known until after the first of 1963 because the figures were in different places. He further testified that at a meeting at which the basic terms of the

limited partnership contract were agreed to, such figures were not available; that at that time the plaintiffs were all told that they could withdraw at any time prior to November 1, 1962. At or about this time, one Wolcoff requested the figures on the cost of the project. Lazarus told him that the auditor had not collected all the figures. Wolcoff stated that he did not want to participate unless he had these figures. Plaintiff Sokol's testimony corroborated the Wolcoff request and statement. Wolcoff elected to withdraw and his money was refunded by the defendants. Another original participant had since become involved in a divorce proceedings and he, too, withdrew and was reimbursed by the defendants.

Rosen, a heating contractor on the job who got out because of his divorce, testified that he had seen the projected cost of this project, that he had been in the heating contracting business for some 24 years, that the cost did not appear to be exorbitant for that type of structure and that no matter who built it it would be the approximate cost. It seems clear that the projected costs were in excess of $700,000, and the various information furnished the participants so indicated. Gevirtz testified that he didn't even read these documents nor did he have any questions about that or make any inquiry about either the cost or the occupancy. Sorkin was a decorator and was paid for decorating the rest home. He testified that he didn't read any of the documents which were sent to him and didn't even read the partnership contract until he consulted his attorney in 1963. The auditor testified that the actual total cost of land and buildings was $542,000, plus. The first mortgagee appraised the property at $650,000 and loaned 60% on it or $390,000. The record further shows that there was an opportunity to sell at slightly in excess of $600,000 and that that proposition was halted when this suit was instituted. The record further shows that the financial difficulties of the operation resulted from insufficient occupancy rather than false or excessive

costs. There is no adequate basis for a finding of actual fraud, misrepresentation or concealment prior to the partnership contract.

The conclusion just made, however, does not militate against our conclusion that the defendants were obligated to deal with their partners in the utmost good faith and cannot and should not make an undisclosed secret profit. In setting up the capital accounts of the limited partnership they have done just that. They charged for services rendered by them something like $56,000. They have charged out of pocket expenses of $5,000. They have charged the amount repaid to Wolcoff of $25,000. They charged a profit on the real estate of $27,000, and they have charged interest on so-called loans of some $3,600. Plaintiffs in Count II have asked for an accounting. This they are entitled to. The defendants have not acted in good faith in setting up the capital accounts. They were acting as joint venturers individually with all the plaintiffs or there was a joint venture between the plaintiffs and the partnership of Lazarus and Glassberg before the partnership contract and thereafter they were all partners. At all times they were fiduciaries. The undisclosed profit to the defendants did not appear until the capital accounts were set up. Properly set up, there is no fraud, there is no secret profit, there is no concealment and misrepresentation. Plaintiffs are entitled to a proper accounting as to the actual cost of this project and to have the capital accounts based upon such an accounting. When these capital accounts are set up, the trial court may then determine the status of the project, whether it can be successfully operated, whether the partnership can properly be continued or whether equity now requires a dissolution of the partnership and the sale of the property to satisfy the respective interest of the parties under the contract. If the loss of the plaintiffs through operations exceeds their contributions then the excess loss is chargeable to the defendants. If there is a profit on the dissolution and sale of the property, then it should be distributed

to the various partners in accordance with the contract. In our judgment this record discloses a proper basis for the taxing of the costs, 50% to the plaintiffs and 50% to the defendants.

Accordingly, the decree is reversed and this cause remanded to the trial court with directions to state a proper account between the parties in accordance with the partnership contract, for further proceedings in accordance with the views herein expressed, and for the taxing of costs in both this and the trial court as herein indicated.

Reversed and remanded.

Craven, J. and Trapp, J. concur.